IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR THE PETITIONER

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RESPONDENT'S MISSTATEMENTS OF FACT

Respondent makes two misstatements of fact. First, on page six of its brief, Respondent states that Petitioner testified he would not pay for the briefcase after he was accused of theft. The Report of the Trial Proceedings, however, contains no such statement. Second, on page three of its brief Respondent omits from its statement of the Sixth Amendment to the United States Constitution the right "to have the Assistance of Counsel for his defense."

ARGUMENT

I.

RESPONDENT'S ARGUMENT THAT COUNSEL IS UNNECESSARY FOR FAIRNESS IN MISDEMEANOR TRIALS THAT DO NOT RESULT IN IMPRISONMENT IS CONTRARY TO FACT AND PRECEDENT AND IS IRRELEVANT IN LIGHT OF THE COURT'S INCORPORATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IN THE FOURTEENTH AMENDMENT.

Respondent's brief has crystallized an issue that is at the heart of this case: whether defense counsel is essential to a fair misdemeanor trial. Counsel is not essential, according to Respondent, because a misdemeanor trial is a relaxed non-adversarial fact-finding process in which inexperienced, passive prosecutors hurriedly present simple factual cases without concern for rules of evidence or procedural formalities. (Resp. Br. 22-24). Respondent, however, mistakes desultory fact-finding for fair fact-finding.

This mistake is critical for two reasons. First, accurate fact-finding is no less a goal of a misdemeanor than a felony trial. The purpose and functions of counsel like "the purpose and functions of the jury do not vary significantly with the importance of the crime." *Ballew v. Georgia*, 435 U.S. 223, 240 (1978). The defendant thus has no less need for either counsel or a representative jury in a misdemeanor case "than when the State has chosen to label an offense a felony." *Id.* at 241. (footnote omitted). Similarly, the state's interest is avoiding unfairness in its trials is the same regardless of whether the prosecution is for a misdemeanor or a felony; "our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Second, when the formality of the trial process does break down the prosecutor has the ability, as well as the duty within ethical limits, to assure that any such relaxation in the adversary relationship serves the goal of conviction rather than acquittal. The prosecutor in the trial below recognized this duty when he refused the judge's request to clarify the facts by asking the defendant more questions. (App.9). In making the judgment that the State had already made its case (App.9), so that further detail was not warranted, the prosecutor was motivated by a duty to try to convict, not a duty to try to clarify the facts.

Respondent's notion that in a misdemeanor trial that does not result in imprisonment the court and prosecutor should have free rein to ignore the procedural formalities of the criminal trial process is belied not only by the functional need for those formalities to safeguard the integrity of the fact-finding process, but also by Illinois law and opinions of the Court. Illinois law[1] leaves no doubt that misdemeanor

[1] No Illinois authority supports the proposition that the procedural requisites for the conduct of a misdemeanor trial that does not result in imprisonment are any less rigorous than they are for a felony trial or for a misdemeanor trial that results in imprisonment. Rather, Illinois courts have held, on the basis of trial records similar to that in the instant case, that the inability of misdemeanor defendants to represent themselves adequately requires reversal of their convictions because of their trials' unfairness. *People v. Eickelman*, 32 Ill. App. 3d 665, 668, 336 N.E.2d 61, 63-64 (1975); *People v. Chilikas*, 128 Ill. App. 2d 414, 417-419, 262 N.E.2d 732, 735 (1970). What the Florida Court of Appeals recently said about defending misdemeanor trials in its State is equally true in Illinois: "There are no 'simple' criminal defense representations, and those that seem so are merely not understood." *Brooks v. State*, 336 So. 2d 647, 651 (Fla. App. 1976). Even Respondent recognizes this fact in observing that in rural areas "the scarcity of qualified attorneys pose(s) great difficulties in propcuring effective representation for indigents" and that the number of qualified attorneys has apparently not increased. (Resp. Br. 35-36). If significant numbers of attorneys are not qualified to provide defense representation in misdemeanor trials, then what quality representation is to be expected of *pro se* defendants?

trials are bound by all of the "invariable attributes" of the criminal trial process, *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973), the adversary nature of which necessitates the Sixth Amendment right to counsel. *Middendorf v. Henry*, 425 U.S. 25, 40 (1976). Moreover, the assembly-line processing of the misdemeanor defendant, which Respondent now advocates as the model of fairness, is exactly what the Court condemned in *Argersinger v. Hamlin*, 407 U.S. 25, 32-36 (1972), as being both inherently unfair and highly prejudicial to the unrepresented defendant's chances for acquittal.[2] Respondent, indeed, stands *Argersinger* on its head by, on the one hand, ignoring its analysis of the necessity of defense counsel for a fair misdemeanor trial and, on the other hand, citing it for limiting the right to counsel to where loss of liberty is involved (Resp. Br. 14), a holding the Court expressly refused to make. 407 U.S. at 37. Respondent's constricted interpretation of the meaning of *Argersinger* is also nonsensical, for a misdemeanor trial without counsel that must be reversed because it is fundamentally unfair if the defendant is sentenced to jail does not suddenly become fundamentally fair if the defendant is only fined.

Once the immutable adversary character of American misdemeanor trials is recognized, Respondent's argument that counsel is of only marginal benefit to misdemeanor defendants cannot be reconciled with the Court's consistently repeated conclusion that "[i]n an adversary system of criminal justice, there is no right

[2] The unacceptable consequence of Respondent's non-adversarial theory of misdemeanor trials is most clearly demonstrated in its factually erroneous and legally nihilistic claim that, even when granted the right to counsel, a defendant's other Sixth Amendment rights are meaningless "in the context of the reality of the over-crowded misdemeanor courts described." (Resp. Br. 24).

more essential than the right to the assistance of counsel." *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978). Respondent's error, however, is not only the factual one of discounting the critical role of defense counsel in a misdemeanor trial. It is also the legal one of defining the determinative issue in this case as whether or not the governmental cost of providing counsel outweighs the relative benefit to defendant of having the assistance of counsel. The Court precluded exactly such weighing of the marginal utility of counsel in promoting fairness at trial when it held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment right to counsel was fundamental to fairness and therefore must be incorporated in the Fourteenth Amendment. *Cf. Herring v. New York*, 422 U.S. 853, 867-68 (1975) (Rehnquist, J., dissenting). As the Court recognized in *Argersinger*, the Sixth Amendment rights incorporated in the Fourteenth Amendment define the scope of their own application: "The Sixth Amendment, which in enumerated situations has been made applicable to the States by reason of the Fourteenth Amendment . . . provides specified standards for 'all criminal prosecutions.'" 407 U.S. at 27 (citations omitted). Thus, when a trial court finds that a defendant faces a "criminal prosecution," it has no discretion to question whether or not the assistance of counsel is essential for a fair trial in that case; after *Gideon* the Framers' determination that counsel is essential "in all criminal prosecutions" is binding upon the states.

Respondent argues neither that Petitioner's misdemeanor-theft prosecution is anything other than "criminal" (*see* Pet. Br. 16-18), nor that the Court should retreat from *Gideon's* incorporation of the Sixth Amendment right to counsel in the Fourteenth Amendment. Instead, Respondent argues that the Sixth Amendment

right to counsel need not be applied literally "in all criminal prosecutions" because it should be analogized to the right to jury trial, which the Court has refused to apply to prosecutions for crimes punishable by less than six months imprisonment. (Resp. Br. 10-13). The Court, however, disapproved this very argument in *Argersinger*: "We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." 407 U.S. at 30-31.

Respondent, nevertheless, asserts that the right to counsel and the right to jury trial should be distinguished from all the other Sixth Amendment rights, which have thus far been applied without regard to the seriousness of the offense, because only the rights to counsel and jury are costly. Although this is a dubious proposition in itself,[3] the critical characteristic of the Sixth Amendment rights that have been incorporated in the Fourteenth Amendment is that all of them, except the right to a jury, are deemed essential to a fair trial. Compare *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1973), with cases cited in *Argersinger v. Hamlin*, 407 U.S. at 28. *See also Fuller v. Oregon*, 417 U.S. 40, 52 (1974) (right to counsel necessary to recognize and take advantage of the other procedural and substantive fair trial safeguards). Moreover, unlike all other Sixth Amendment rights, the

[3] The cost of providing sufficient judges, prosecutors and courtrooms to assure defendants speedy trials is obviously considerable. Although the State could also save substantial time and expense if it did not have to confront the defendant with the witnesses against him, such cost-saving has never been a factor in deciding the application of the Sixth Amendment right to confrontation. *See Pointer v. Texas*, 380 U.S. 400 (1965). The commentator whom Respondent cites in support of a distinction between the rights to counsel and jury and all other Sixth Amendment rights on the basis of the former's cost of implementation emphatically rejects the use of such distinction in order to apply the right to counsel more narrowly than the non-jury Sixth Amendment rights. J. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685, 708 (1968).

Court has found historical reasons for limiting the right to jury trial to a narrower compass than that specified by the terms of the Sixth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). Exactly the opposite is the case with the right to counsel, for "there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided." *Argersinger v. Hamlin*, 407 U.S. at 30.

Finally, even if Respondent's jury trial analogy were to be accepted, reversal of Petitioner's conviction would still be required. The Court's jury trial cases make clear that the relevant criterion for distinguishing between serious and petty offenses is the penalty authorized by law, not the penalty actually imposed. *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968); *Baldwin v. New York*, 399 U.S. 66, 68-70 (1970). Since the authorized penalty for misdemeanor theft in Illinois was a maximum one year's imprisonment, Ill. Rev. Stat. ch. 38, § 16-1 (1969), Petitioner was tried for what the Court has classified as a serious offense under the standard adopted in *Baldwin*, 399 U.S. at 69.

Respondent's argument that prosecutions for even such serious offenses do not warrant the right to counsel fails on three grounds. First, it makes the Sixth Amendment's explicit application "in all criminal prosecutions" totally meaningless. Second, it makes the application of *Gideon's* holding that counsel is an essential element of fundamental fairness contingent upon whether or not a particular state has classified an offense as a felony, rather than upon whether or not the offense charged is serious enough to warrant the constitutional requisites of a fair trial. The Court has previously rejected the arbitrary formalism of making

constitutional rights depend upon a particular state's classification of offenses as misdemeanors or felonies. *Ballew v. Georgia*, 435 U.S. 223, 240 (1978); *cf. Patterson v. Warden*, 372 U.S. 776 (1963). Third, it effectively nullifies the right to jury trial. Although Respondent asserts that a layman can adequately try a misdemeanor case to a jury (Resp. Br. 24-25), Respondent does not explain how laymen can be expected to perform adequately the tasks that are critical in trying any criminal case to a jury, such as, jury *voir dire*, making an opening statement, objecting to incompetent evidence, making a closing argument, proposing jury instructions and arguing the post-trial motions necessary to preserve error for appeal. Competency in these crucial functions is not always found in practicing criminal defense attorneys; to expect if from laymen is unrealistic.

In summary, Respondent has offered no rationale and no precedent to controvert the logic of Petitioner's alternative Sixth Amendment arguments: first, that the Sixth Amendment, as incorporated in the Fourteenth Amendment, applies by its own terms "in all criminal prosecutions" and therefore in all prosecutions for misdemeanors in which imprisonment is authorized; and second, that regardless of whether the Sixth Amendment's terms are to be applied literally, the right to counsel is as fundamental to fairness in a misdemeanor trial that does not result in imprisonment as it is in a felony trial or in a misdemeanor trial that does result in imprisonment. Moreover, even if there could be some doubt after *Gideon* and *Argersinger* as to whether an indigent misdemeanor defendant's right to appointed counsel at trial is fundamental to fairness, there can be no doubt, and none is suggested by Respondent, that the Sixth Amendment was violated by the trial court's failure to notify Petitioner that he had a right to be represented by his own counsel at his own expense. (*See* Pet. Br. 20-21).

II.

PETITIONER RAISED THE QUESTIONS OF THE DENIAL OF HIS RIGHT TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL BOTH IN THE ILLINOIS COURTS BELOW AND IN HIS PETITION FOR CERTIORARI. THESE QUESTIONS ARE THEREFORE NOT WAIVED.

Since Petitioner argued repeatedly in his state appellate court briefs that he was denied due process, equal protection and a fair trial it is frivolous for Respondent to contend that Petitioner waived those claims in this Court. Thus, Petitioner stated in his Illinois Appellate Court brief; "The Record clearly shows that Scott did not receive a fair trial." (p.15). In his Illinois Supreme Court brief Petitioner states: "Given the Report of Proceedings in both Scotts' and Harris'[4] trials, there can thus be no question that they did not receive fair trials and that the unfairness is directly attributable to the absence of defense counsel." (p.12).

With respect to Petitioner's due process and equal protection claims, he stated in his appellate court brief: "The constitutional mandates of equal protection and due process require an objective standard for appointment of counsel." (p. 18). Petitioner's due process and equal protection claims were addressed explicitly by both Respondent, Brief in the Appellate Court of Illinois, 14-18, and the Illinois Appellate Court. Appendix to Petition for Certiorari, 14a-15a, 36 Ill. App.3d 304, 310, 343 N.E.2d 517, 522, Petitioner also presented these issues to the Illinois Supreme Court. In his Petition For

[4] The appeal in *People v. Harris* was consolidated with the instant case in the Illinois Supreme Court. Harris was tried for five misdemeanor traffic violations without being notified of her right to counsel or jury trial. She was fined for three violations and sentenced to three days in County Jail for one violation, for which she served one day in jail. The State confessed error because of the failure to advise Harris of the right to jury trial.

Appeal As A Matter Of Right Or In the Alternative For Leave To Appeal, Petitioner argued that "inequities and further due process violations" would follow from the determination of the right to counsel on the basis of a pre-trial prediction of sentence. (p. 17). In his Illinois Supreme Court brief on the merits, Petitioner argued that, "inequalities, inefficiencies and arbitrary judicial decision-making," would result from such a predictive determination of the right to counsel. (p. 16). Moreover, Respondent has previously recognized that Petitioner has raised a Fourteenth Amendment argument that is distinct from his Sixth Amendment argument since Respondent argued in both his brief to the Illinois Supreme Court (p. 26) and in his Brief in Opposition to the Petition for Certiorari filed in this Court (p. 12) that the predictive sentencing determination procedure by which misdemeanor defendants can be denied the right to counsel is not a violation of the Fourteenth Amendment.

Pursuant to Illinois Supreme Court Rules 341(e)(7), 612(j), Ill. Rev. Stat. ch. 110A, § 341(e)(7), 612(j) (1977), Illinois courts will find issues raised for consideration on appeal even if they are "buried within the confines of . . . [the] argument." *Department of Conservation v. First National Bank*, 36 Ill. App. 3d 495, 505, 344 N.E.2d 11, 19 (1976). Since, as Respondent recognizes, Illinois law governs the question of whether issues have been properly preserved for consideration by the State's appellate courts, there can be no doubt that Petitioner's explicit discussion of the denial of due process, equal protection and a fair trial in the Illinois courts below preserves those questions for consideration by this Court.

Respondent bases its argument that the Petition for Certiorari did not raise a Fourteenth Amendment claim independent of a Sixth Amendment claim (Resp. Br. 42), entirely upon its change in the substance of the question presented in the Petition. Contrary to Respondent's brief, the question presented was not whether "the Sixth Amendment as applied to the States by the Fourteenth" guarantees the right to counsel. (Resp. Br. 2) Rather, the Court accepted certiorari on the question of "whether the Sixth *and* Fourteenth Amendments" guarantee the right to counsel. (Petition for Certiorari, 2) (emphasis added). Since the Court under Supreme Court Rule 23(1)(c) will consider questions fairly comprised within the questions set forth in the Petition, it was unnecessary for Petitioner to set forth the actual contents of either the Sixth or the Fourteenth Amendments as questions presented for review. By specifying the numerical designation of the Amendments relied upon, rather than quoting their contents, Petitioner also avoided the "unnecessary detail" proscribed in Supreme Court Rule 23(1)(c). Moreover, such designation is more definite than the general reference to unconstitutionality that the Court has previously found acceptable. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 98-99 (1976); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (*cert. question at* 45 U.S.L.W. 3299) (U.S. Oct. 19, 1976).

III.

RESPONDENT'S ARGUMENT THAT MISDEMEANOR DEFENDANTS WHO ARE ONLY FINED ARE PROTECTED BY NEITHER THE SIXTH NOR THE FOURTEENTH AMENDMENT CONTRADICTS PRECEDENT AND NULLIFIES THE SUPREMACY CLAUSE. RESPONDENT'S ALTERNATIVE ARGUMENT THAT THE COST OF PROVIDING COUNSEL OUTWEIGHS DEFENDANT'S INTEREST IN COUNSEL IS IRRELEVANT AS A MATTER OF LAW AND ERRONEOUS AS A MATTER OF FACT.

Since Respondent recognizes, as it must, that misdemeanor trials are criminal proceedings (Resp. Br. 43), Respondent's declaration that "[t]he Sixth Amendment enumerates a specific right to counsel which applies in criminal proceedings" (Resp. Br. 42) contradicts the argument in Part I of Respondent's brief that the Sixth Amendment right to counsel does not apply to misdemeanor trials not resulting in imprisonment. If Respondent did not intend to concede the Sixth Amendment issue in this fashion, the only alternative rationale for its argument that neither the Sixth nor the Fourteenth Amendment applies to Petitioner's case is that a misdemeanor trial not resulting in imprisonment is neither a true criminal proceeding to which the Sixth Amendment applies nor a true civil proceeding to which procedural due process applies. It would instead be depicted as some form of pseudo-criminal proceeding that is beneath the commands of the Constitution. Acceptance of this theory, however, would be both unprecedented and an evasion of the Supremacy Clause through a definitional abstraction that would hide the substance and the method of Petitioner's deprivation. Regardless of how Illinois chooses to characterize its misdemeanor prosecutions, they are not immune from constitutional scrutiny. If Petitioner's fine-only misdemeanor theft prosecution is a criminal prosecution,

the Sixth Amendment right to counsel applies. If it is not, it still resulted in a governmental deprivation of substantial interests in liberty and property (Pet. Br. 23, 42-46); therefore, the due process requirement of fundamentally fair fact-finding procedures applies.

Under both Sixth Amendment and procedural due process theories of the case, Respondent would have the Court apply a balancing test in order to establish that the governmental cost of providing counsel outweighs the defendant's interest in counsel. Cost is, of course, a necessary consideration for the state in choosing the method used to provide indigent defendants with competent counsel. Cost, however, is not a consideration in determining the state's obligation to provide counsel in order to assure defendants a fair trial. This distinction in the proper role of governmental cost considerations under the Sixth Amendment was recently emphasized in *Bounds v. Smith*, 430 U.S. 817 (1977), where the Court pointed out that the fact that the state must shoulder affirmative obligations to provide prisoners with meaningful access to the courts, including paying lawyers for indigent defendants at trial, "is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access." *Id.* at 825. "But," the Court cautioned, "the cost of protecting a constitutional right cannot justify its total denial." *Id.* Therefore, the Court concluded, the inquiry is neither whether alternatives, such as jailhouse lawyers, are available nor whether affirmative state action is required; "the inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* Similarly, the inquiry in the instant case is not whether

some defendants can be acquitted without counsel nor whether the state must pay for counsel: it is, as in *Gideon* and *Argersinger*, whether counsel is an essential element of a fair criminal trial.

Respondent's balancing test is no more justified under a procedural due process theory of the case. Respondent cites no authority for the proposition that in determining the due process safeguards essential for fair judicial decision-making at trial the Court will balance the need for fair procedures against the governmental cost of providing such procedures. *In re Gault*, 387 U.S. 1 (1967), stands uncontradicted for the proposition stated in Petitioner's brief at 23-24, that in deciding a defendant's due process right to counsel in the context of a criminal-type trial proceeding, the Court will find determinative how necessary counsel is for fairness, not how costly counsel is for the state. Should a balancing test be applied, however, Respondent misconstrues the relevant interests on both sides of the balance.

A. Counsel Is As Necessary To A Fair Trial In A Misdemeanor Prosecution Not Resulting In Imprisonment As It Is In A Felony or Misdemeanor Prosecution Resulting In Imprisonment. Furthermore, A Misdemeanor Defendant Who Is Not Imprisoned Has Sufficient Interest At Stake To Require The Requisites Of A Fair Trial.

As noted above, pp. 2-6, Respondent's contention that counsel is not essential to a fair misdemeanor trial that does not result in imprisonment is contradicted both by Court decisions on the significance of defense counsel for a fair trial and by Illinois law, according to which the trial of a such misdemeanor is no less formal and no less complex than the trial of a felony or a misdemeanor that does result in imprisonment. Moreover, Respondent's claim that in practice many judges and prosecutors tend

to "relax" the procedural formalities in misdemeanor prosecutions that do not result in imprisonment (Resp. Br. 22-23, 43) only emphasizes the defendant's need for counsel to assure that his procedural rights are not "relaxed" out of existence.

Respondent's argument that the deprivation resulting from a fine-only misdemeanor conviction is not sufficiently significant to warrant the safeguard of counsel is illogical. Respondent recognizes that the consequence of such convictions, including disqualification for certain employment, enhancement of subsequent charges and sentences and use for subsequent impeachment, may be significant.[5] (Resp. Br. 17-18). Yet, because these consequences have different actual effects in different cases, Respondent argues that they provide an unworkable standard for determining the right to counsel and so should be disregarded. (Resp. Br. 18). Petitioner, however, rather than advocating such an "actual consequence" standard for determining the right to counsel, has advocated the exact contrary—that the prospect of such consequences in all prosecutions for misdemeanors punishable by imprisonment are sufficiently significant to require those safeguards essential to a fair trial. Providing the right to counsel in all prosecutions for crimes punishable by imprisonment creates a more

[5] Respondent does not address the problem of the aggravated stigma of conviction when a misdemeanor defendant is given a prison sentence that the Court considers "served." (Pet. Br. 43 n.24). However, Respondent's citation of authority that time served is "the usual sentence for shoplifters in Chicago Municipal Court," (Resp. Br. 39 n.34) indicates the pervasiveness of this anomaly in the way courts apply the imprisonment-non-imprisonment criterion for the right to counsel. Because such time-served sentences are directly related to an indigent defendant's inability to afford bond, denying the right to counsel solely because the sentence was served before rather than after trial has serious equal protection implications.

rational and consistently appropriate boundary than the criterion of actual imprisonment advocated by Respondent; for, as the Court found in *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971), in certain cases imprisonment may have less serious effects than the collateral consequences of a fine-only conviction. Imprisonment is, of course, a most severe sanction that may not be imposed without the safeguards essential to a fair trial; but, Respondent's argument that the stigma to a convicted defendant's good name, the prejudice to his career opportunities and the limitations on his freedom incident to probation and suspended sentence are too insignificant to justify the same fair trial safeguards is callous and contrary to the Court's past recognition of the gravity of such nonimprisonment consequences of criminal and quasi-criminal convictions. (*See* Pet. Br. 42-46).

B. Respondent's Cost Argument Is Purely Speculative, Contrary To Probability and Erroneous in Sacrificing The Requisites Of Fairness To The Claims of Economy.

In both its Fourteenth and Sixth Amendment arguments Respondent relies principally on the contention that extending the right to counsel to Petitioner's circumstances would be too costly for the States to bear. (Resp. Br. 25-37). Respondent, however, neither advances reliable statistical support for its cost argument nor rebuts the argument of Petitioner and Amicus that the cost of such an extension need not be significantly greater than the cost of complying with *Argersinger*. Most important, there is no evidence to show that the sixteen to twenty-one states that have already extended the right to counsel to cases where imprisonment is an authorized penalty have as a result suffered any significant adverse economic impact. Respondent's assertion

that such an extension would impose economic and social costs "simply too great to permit" (Resp. Br. 35, and 25-37 generally) therefore fails the test of experience.[6]

Respondent's attempt to quantify the cost of such an extension also fails the test of reliability because several critical variables are missing from its extrapolations from selected Illinois courts' and public defenders' caseload statistics. Thus, in speculating about the effect of an authorized imprisonment standard in Cook County, Illinois, Respondent compares the public defender's current municipal court caseload with the municipal court's total caseload without indicating what percentage of that total caseload concerns matters that would not be affected by adoption of an authorized imprisonment standard, including felony preliminary hearings, probation violations and offenses having no authorized imprisonment, such as ordinance violations and petty offenses. (Resp. Br. 30-31). In estimating the effect of an authorized imprisonment standard in Brown County, Illinois (Resp. Br. 27-28), Respondent omits the crucial statistic of how many of the forty-six accused misdemeanants in 1976 were in fact represented by counsel. Respondent's assertion that 420 new non-felony cases would have required appointment of counsel in Brown County is based upon its inclusion of 853 traffic and

[6] Not only does Respondent fail to support its contention that increasing defense representation will congest the courts (Resp. Br. 34), but it contradicts such contention by asserting that, according to one study of misdemeanor courts, "even with appointed counsel present, the trials which were conducted were characterized by lack of formal motions, nonexistent cross-examination and quick disposition of cases." (Resp. Br. 23) (footnote omitted). The fact that a majority of such cases are immediately plea bargained (Resp. Br. 23, n. 16) demonstrates that when the defendant as well as the state has counsel an expeditious disposition acceptable to both sides is likely.

thirty-four conservation violations, categories of cases that are not necessarily before the Court in this case. (*See* Pet. Br. 16). When such cases are excluded from Respondent's calculations, only twenty-two new non-felony cases would have required appointment of counsel in 1976 under an authorized imprisonment standard.

Respondent's assertion that in Birmingham, Alabama a tenfold increase in expenditures would be required under an authorized imprisonment standard is similarly misleading. (Resp. Br. 29). Respondent derives this figure from S. Krantz et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* (1976) at 361. However, the authors of this study admit that "accurate existing or potential non-felony case statistics are simply not available at either the national or local level." Krantz, at 11. Moreover, the authors make clear that this tenfold estimated increase is "extraordinary only in light of the present low expenditure." *Id.* at 361. Krantz et al. estimate that the present cost of misdemeanor defense representation in Birmingham is twenty dollars per case, while their projected cost under an authorized imprisonment standard would be fifty dollars per case. Assuming, however, no change in per case defense cost, the increase from adopting an authorized imprisonment standard, which would include traffic offenses, would be only fourfold. Even this cost estimate may be too high. According to Respondent's own statistics from the Circuit Court of Cook County, Illinois, in which the defense cost per misdemeanor case is approximately twenty-four dollars, the increase from adopting an authorized imprisonment standard would be twofold. (Resp. Br. 31). Moreover, even this cost estimate may be far too high because it ignores the fact that many misdemeanor defendants waive counsel (Amicus Br. 10) and because it relies on a forty-

seven percent indigency rate for misdemeanants that may be more than four times higher than is warranted.[7]

The absence of reliable statistics is a critical deficiency in Respondent's cost argument because the most logical *a priori* judgment on the cost question would be that the increase in the need for appointed counsel from applying an authorized imprisonment standard would not be great. Presumably, trial courts have generally attempted to respect their legislatures' judgments that imprisonment is an appropriate potential penalty for violation of the criminal laws that authorize such penalty. Indeed, the Supreme Courts of Washington[8] and Wisconsin[9] have found it an improper infringement upon legislative authority for trial courts to eliminate imprisonment as an alternative sentence before trial under any circumstances. Therefore, assuming proper judicial deference to legislative intent, it follows that courts have generally kept the imprisonment option open in the absence of unusual circumstances that make it clear before trial that imprisonment could not be an appropriate sentence. Moreover, as the Court has recently emphasized in *United States v. Grayson*, ... U.S. ....., 98 S.Ct. 2610, 2617 (1978), since rational sentencing cannot be accomplished without the information about the defendant that can be gained only during the trial, most trial courts can be expected to appoint counsel before trial in order to avoid predetermining the sentence on

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[7] The National Conference of Commissioners on Uniform State Laws found that "Because of the much lower cost of counsel for nonfelony cases, it appears that less than 10% of nonfelony defendants meet indigency standards, as opposed to 60-65% of felony defendants." Uniform Rules of Criminal Procedure (Approved Draft 1974) 54.

[8] *McInturf v. Horton*, 85 Wash. 2d 704, 706, 538 P.2d 499, 500 (1975) (quoted at Pet. Br. 32).

[9] *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791, 795-6 (1977) (quoted at Pet. Br. 33).

the basis of arbitrary guess-work.[10] Thus, in the absence of contrary statistical evidence, it may be presumed that trial courts appoint counsel in the great majority of prosecution for misdemeanors punishable by imprisonment because there is no other way to accommodate the holding of *Argersinger* with both their legislatures' intent in authorizing imprisonment and their own desire to perform their sentencing functions rationally.

Even if it were presumed that trial courts were not now granting the right to counsel in the majority of prosecutions for offenses punishable by imprisonment, states can take effective steps to minimize the costs of requiring the right to counsel in such cases. In this regard, Respondent does not dispute the arguments of Petitioner and Amicus that additional costs can be drastically curtailed and possibly eliminated by replacing or supplementing appointed private counsel with public defenders (Amicus Br. 11-13) and by "decriminalization" (elimination of imprisonment as a possible penalty) of the innumerable minor violations for which the deterrent effect of a prison penalty is unnecessary. (Pet. Br. 39; Amicus Br. 4-7).

Respondent argues, however, that the Court cannot properly consider such cost-cutting measures since their implementation is within the sole province of the legislature. (Resp. Br. 33). The fallacy in this argument is that the due process balancing test requires the Court, rather than the legislature, to weigh the interests on both sides of the balance. *E.g. Goldberg v. Kelly*, 397 U S. 254, 265-266 (1970). By foreclosing the Court from

[10] Respondent's argument that prosecutors in misdemeanor courts can help judges "to evaluate cases on a rational basis prior to trial," (Resp. Br. 38) is belied by Respondent's own characterization of such prosecutors as utterly unprepared before trial. (Resp. Br. 22-23).

considering the effect of measures that would enable the state to reduce the cost of fair fact-finding procedures, Respondent would have due process depend upon whatever the state finds most convenient, rather than upon what the Court deems an appropriate balance between the interests of the state in avoiding undue cost and of the individual in being tried fairly.

Moreover, it is noteworthy that Respondent argues that if the state encounters problems in law enforcement because of *Argersinger's* requirement of the right to counsel, "appropriate adjustment suitable to the needs of each particular locality can be made at the local level." (Resp. Br. 20). Similarly, if the state should encounter difficult burdens because the Court now requires counsel in misdemeanor prosecutions where imprisonment is authorized, adjustments, such as decriminalization and statewide public defender systems, may also appropriately be made to lighten or even eliminate the burdens.

In summary, Respondent's argument that extending the right to counsel to Petitioner's category of offense would be so costly that it outweighs the defendant's interest in avoiding an unfair conviction rests upon unreliable cost estimates and is belied by the inferences as to appropriate judicial decision-making that may fairly be drawn from the available evidence. The argument's greatest flaw is that it attempts to measure due process in dollars and cents, a standard upon which the defendant's interests in being fairly tried cannot be sacrificed. *Taylor v. Hayes*, 418 U.S. 488, 500 (1974). Neither can the state's interest in this case be quantified in dollars and cents; for if any cost to the state is to be an element of a balancing test in this case, the cost that is paramount is the harm to society when its criminal trials are unfair. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); Pet. Br. 29-31. *See also Mayberry v.*

Pennsylvania, 400 U.S. 455, 468 (1971) (Burger C. J., concurring) ("A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.").

IV.

PETITIONER'S EQUAL PROTECTION CLAIM REMAINS UNCONTRADICTED BY RESPONDENT'S ARGUMENTS.

Respondent has not addressed the merits of Petitioner's equal protection claim. (Pet. Br. 47-50). Moreover, none of Respondent's Due Process or Sixth Amendment arguments diminish the force of that claim. Regardless of how the Court balances the interests in determining the requisites of due process and regardless of whether it limits the scope of the Sixth Amendment's application in criminal prosecutions, there can be no doubt that to deny a misdemeanor defendant the right to appointed counsel at trial results in an equal protection violation as, if not more, serious than the equal protection violation found in the denial of the right to appointed counsel on first appeal in *Douglas v. California*, 372 U.S. 353 (1963), and in the denial of a free transcript in the appeal of a fine-only ordinance violation in *Mayer v. City of Chicago*, 404 U.S. 189 (1971). (*See* Pet Br. 48-50).

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's initial brief, Petitioner respectfully requests that the judgment of the Supreme Court of Illinois, which affirmed the decision of the Appellate Court of Illinois, First District, which affirmed the conviction of Petitioner by the Circuit Court of Cook County, Illinois be reversed.

Respectfully submitted,

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